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IN THE

Supreme Court of the United States

October Term, 1985

RHETT G. CAMPBELL, TRUSTEE,

Petitioner,

v.

WELLS FARGO BANK, N.A.,
FIRST SECURITY BANK OF UTAH, N.A.,
FIRST SECURITY LEASING/VALLEY PARTNERSHIP NO. 1,
a General Partnership, and
FIRST SECURITY/VALLEY PARTNERSHIP NO. 1,
a General Partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a plaintiff seeking to maintain an action against a bank under the broad anti-tying provisions of 12 U.S.C. §§ 1971-1975 (the "Bank Tying Act"), which provides in Section 1975 that "[a]ny person who is injured in his business or property" has a private right of action, must demonstrate that such plaintiff's injury is a "direct consequence" of the unlawful conduct of which it complains, as is required by certain precedents involving the anti-trust statutes?

2. Whether, assuming that anti-trust standing limitations are applicable to suits under the Bank Tying Act, a plaintiff has a private right of action against a bank under circumstances in which the bank injured its immediate customer with the actual or

constructive knowledge that such injury would automatically and directly flow through to such plaintiff through the operation of state mechanic's and materialmen's lien statutes?

LIST OF ALL PARTIES

PETITIONER

The Petitioner is Rhett G. Campbell, Trustee of the Tiger Oil and Tiger Drilling Creditors Trust. Joseph C. Canizaro was also a Plaintiff-Intervenor/Appellant in the court below.

RESPONDENT

The Respondents in this case are Wells Fargo Bank, N.A., First Security Bank of Utah, N.A., First Security Leasing/Valley Partnership No. 1, and First Security/Valley Partnership No. 1.

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IN THE
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RHETT G. CAMPBELL, TRUSTEE,

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v.

WELLS FARGO BANK, N.A.,
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FIRST SECURITY LEASING/VALLEY
PARTNERSHIP NO. 1, a General Partnership,
and FIRST SECURITY/VALLEY PARTNERSHIP
NO. 1, a General Partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Rhett G. Campbell, Trustee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 28, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 781 F.2d 440-43, and is reprinted in Petitioner's Appendix ("Pet. App.") at Pet. App. A1-A7.

The Memorandum Rulings of the United States District Court for the Western District of Louisiana (Stagg, D.J.) are not reported. Copies of such Memorandum Rulings are provided at Pet. App. D1-D28 and E1-E9.

JURISDICTION

The judgment of the Court of Appeals was filed on January 28, 1986. The Petitioner thereupon timely filed a petition for rehearing and suggestion for en banc consideration which were both denied on February 28, 1986. Pet. App. at B1-B2. This Court's juris-

diction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

12 U.S.C. § 1975 (1982). **Civil actions by persons injured; jurisdiction and venue; amount of recovery**

Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioner is the Trustee of the Tiger Oil and Tiger Drilling Creditors Trust (the "Tiger Trust"). On July 2, 1984, Petitioner filed his Plaintiff's First Amended Complaint in the United States District Court for the Western District of Louisiana, Shreveport Division (a copy of which is included at Pet. App. F1-F65) which alleged in Count I that Respondents Wells Fargo Bank, N.A., et al. (referred to hereinafter collectively as the "Banks"), had committed acts which were unlawful under 12 U.S.C. §§ 1971-1975 (1982) (hereinafter the "Bank Tying Act"), resulting in significant damages to the Tiger Trust.

Summarizing the allegations of Petitioner's Amended Complaint, the Petitioner alleges that the Banks engaged in a series of lending practices

with respect to Latham Exploration Company, Inc. ("Lexco") and its affiliates which dramatically affected Lexco's abilities to carry out its normal business activities and which were violations of the Bank Tying Act. For example, the Banks tied their extensions of credit to Lexco (some of which credit was never extended as promised) to the guaranty by Lexco of certain indebtedness of affiliates owed to subsidiaries of the Banks for which there was no legitimate business justification. The Tiger Trust is the owner of certain legal and equitable interests in five oil and gas wells (the "Tuscaloosa Wells") drilled by Lexco in Pointe Coupee Parish, Louisiana. Petitioner alleges that because of the unlawful lending practices of the Banks, Lexco was unable to pay for materials and ser-

vices used in the drilling and completion of the Tuscaloosa Wells,[1/] leading to the filing of more than $21 million in mechanics' and materialmen's liens against such wells. Under Louisiana law, these mechanics' and materialmen's liens encumber the interests of all owners of the wells, including the ownership interest of the Tiger Trust. The Banks knew at the time of the unlawful acts that Lexco was drilling the Tuscaloosa Wells, and knew that the Tiger Trust and others had acquired interests in the wells. Thus, Petitioner alleges that the direct and foreseeable result of the Banks' unlawful

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[1/] On October 17, 1983, Lexco filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of Louisiana, Shreveport Division, Case No. 583-01408-S.

acts was significant diminution of the value of Petitioner's property interests in the Tuscaloosa Wells.

On October 2, 1984, prior to any discovery in the case, the United States District Court for the Western District of Louisiana issued a Memorandum Ruling (copy attached at Pet. App. D1-D28) which granted the Banks' Motion to Dismiss the Petitioner's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The basis for this ruling was that since the Tiger Trust had not directly been a "customer" of the Banks, it lacked standing to maintain an action under the Bank Tying Act. Pet. App. at D-22. The district court's order of dismissal was without leave to amend.

On December 28, 1984, the district court issued a second Memorandum Ruling (copy attached at Pet. App. E1-E9)

affirming its earlier order of dismissal without further analysis, but which also certified the issue to the Fifth Circuit pursuant to 28 U.S.C. § 1292(b) (1982) as requested by Petitioner. The district court conceded that "there are no cases which deal with this precise issue" and acknowledged that there was substantial room for disagreement since "another court could conclude, as suggested by plaintiff, that the broad language of the statute means precisely what it says." Pet. App. at E4-E5. Convinced that the broad language of the Bank Tying Act did, in fact, mean precisely what it said, Petitioner filed a Petition for Permission to Appeal with the United Sates Court of Appeals for the Fifth Circuit which was granted on March 4, 1985. Pet. App. at C1-C2.

On January 28, 1986, a panel of the court below (hereinafter the

"Panel") issued its Opinion (hereinafter the "Panel Opinion," a copy of which is attached at Pet. App. A1-A7) affirming the district court's dismissal of Petitioner's Complaint. The Panel conceded that this case presented an issue of first impression and expressly rejected as erroneous the district court's holding that only bank "customers" have standing to bring actions under the Bank Tying Act. Pet. App. at A5. However, while characterizing the legislative history of the Act as "sparse," id., the Panel nevertheless concluded that standing under the Bank Tying Act must be governed by the confusing tests devised with respect to Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15 (1982) (the "Clayton Act"). Measuring Petitioner's allegations against the standards applicable to antitrust actions, the Panel held that as a matter

of law the Tiger Trust did not allege injuries that were a "direct consequence of the defendant's activities," Pet. App. at A7, and affirmed the district court's order of dismissal. Again, such dismissal was ordered without affording Petitioner leave to amend in order to attempt to meet the standing requirement announced for the first time in this case.

REASONS FOR ALLOWANCE OF THE WRIT

I.

THIS CASE PRESENTS A QUESTION OF SIGNIFICANT IMPORTANCE AND BROAD APPLICATION.

The anti-tying provisions of the Bank Tying Act were enacted by Congress in 1970 as part of a series of amendments to the Bank Holding Company Act of 1956, 12 U.S.C. § 1841, et seq. (1982) (hereinafter the "Bank Holding Company Act"), designed to provide "adequate

safeguards against the possibility of misuse of the economic power of a bank." S. Rep. No. 1084, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 5519, 5535. Section 1975 of the Bank Tying Act provides a private right of action to "[a]ny person who is injured in his business or property by reason of anything forbidden in Section 1972." Despite both the broad language of this statutory provision and its remedial character, the lower court (the Fifth Circuit) has held in this case that Petitioner lacks standing to maintain any tying action against the Banks. The basis for the lower court's holding was that the injuries alleged by Petitioner were not a "direct consequence" of the unlawful conduct of which Petitioner complains. In so holding, the lower court decided an important question of first impression with

respect to the Bank Tying Act in a manner that could have potentially far reaching and unanticipated consequences for plaintiffs under a large number of federal remedial statutes.

Largely because the language of Section 1975 is virtually identical to that employed in Section 4 of the Clayton Act,[2/] the Fifth Circuit held

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[2/] Section 4 of the Clayton Act provides in pertinent part as follows:

> . . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (Supp. 1985).

that precedents developed with respect to standing under the antitrust statutes were applicable to impose a "direct injury" requirement upon plaintiffs under the Bank Tying Act.[3/] However, the similarity of language between Section 1975 of the Bank Tying Act and Section 4 of the Clayton Act is not confined to those two statutes. A host

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3/ Although the lower court also appeared to find support for its application of antitrust standing limitations to the Bank Tying Act in its conclusion that the "purpose" of the Act was to apply the antitrust laws to the field of commercial banking, Pet. App. at A5, it is clear that the Bank Tying Act was not enacted for any such reason. Congress specifically defined the term "Antitrust laws" in 15 U.S.C. § 12 (Supp. 1985). The Bank Tying Act is not one of the statutes included within such definition. Indeed, as discussed infra at Section III, Congress enacted the Bank Tying Act for purposes that were not served by the antitrust laws and determined not to amend the antitrust laws to accomplish such purposes.

of other federal statutes,[4/] including the Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"), 18 U.S.C. §§ 1961-1968 (1982), employ the same or very similar language in providing a private right of action. The lower court's decision in this case suggests that the standing issues which have proven so perplexing in the anti-trust context will soon afflict plaintiffs under a variety of important federal remedial statutes for which such limitations were not designed. This wholesale importation of standing

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[4/] Examples of statutes with the same or similar language include 7 U.S.C. § 2305(c) (1982) (unfair trade practices affecting producers of agricultural products); 12 U.S.C. § 1464(q) (1982) (unlawful credit practices by federal savings and loan associations); 15 U.S.C. § 72 (1982) (unfair importation of articles at less than market value); 28 U.S.C. § 1343 (1982) (civil rights); 28 U.S.C. § 1357 (1982) (injuries under federal laws); and 46 U.S.C. § 1227 (1982) (discrimination under the Merchant Marine Act).

barriers is particularly alarming in light of the fact that it would occur without any serious consideration of the policies behind adoption of such barriers in the antitrust context, and would be based primarily upon the presence of language which Congress did not know at the time of its adoption would be subjected to such a narrow interpretation.

It was not until 1983 that this Court found a direct injury requirement to be applicable to Section 4 of the Clayton Act. See Assoc. General Contractors v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) (hereinafter "Associated General Contractors"). However, in doing so this Court did not find that the statutory language chosen by Congress required such a restrictive interpretation. Indeed, the Court expressly recognized that "[a] literal

reading of the statute [§ 4] is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." Id. at 529. The Court determined in Associated General Contractors that a direct injury requirement was applicable to the Clayton Act -- not because of any such indication in the language of the statute -- but because there were indications in the legislative history that Congress had intended to preserve certain limitations that were applicable at common law. Id. at 531-35. There are no such indications in the legislative history of the Bank Tying Act.[5/] Petitioner submits that

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[5/] In fact, the legislative history of the Bank Tying Act contains clear indications that Congress meant its language to be interpreted literally. In introducing an amendment to the anti-tying provisions of the Bank

Footnote continued on next page.

any imposition of a "direct injury" requirement upon plaintiffs under federal statutes employing language similar to Section 4 of the Clayton Act should and must be based upon the intent of Congress as expressed in the particular legislative history of each such statute and not merely because there exists a similarity of language.

5/ Continued

Tying Act in the initial congressional debates, Senator Bennett made the following comment concerning the precision with which Congress had chosen its language:

> This amendment is the result of 5 or 6 weeks of intensive work by representatives of the Departments of Justice and the Treasury, the Federal Reserve Board, the committee staff, and staff men representing individual Senators on the committee. I know of no language that has been more carefully worked over to accomplish the exact purpose it was intended to accomplish.

116 Cong. Rec. 32,127 (1970) (remarks of Sen. Bennett) (emphasis added).

Another factor counseling against automatic imposition of a direct injury requirement upon plaintiffs under the Bank Tying Act is the complete absence of any legitimate policy justification for doing so. As the lower court acknowledged, the principal policies behind imposing such a requirement in the antitrust context were the difficulty of proof of an "indirect" injury and the potential for multiple liability. Pet. App. at A6. See also, Associated General Contractors, 459 U.S. at 543. As discussed below, neither of these policies are served by denying standing to Petitioner. However, the lower court expressly declined to decide whether these policies were applicable to Petitioner's injury in this case, Pet. App. at A6-A7, ruling instead that the Court's finding that Petitioner's

injury was "indirect" was sufficient to deprive Petitioner of standing. Thus, by mechanically applying standing tests developed under the antitrust statutes, the lower court ruled that Petitioner was unable to maintain an action under the Bank Tying Act despite the absence of any consideration of whether the policies behind adoption of those tests in the context of the antitrust statutes would be served.

A final factor weighing heavily against application of antitrust standing jurisprudence to the Bank Tying Act and similar statutes is the confusion engendered by, and questionable value of, such concepts. As the Court is aware, even in the context of the antitrust statutes, there has been considerable confusion, academic criticism, and

controversy surrounding the technical standing requirements applicable to antitrust plaintiffs.[6/] Petitioner submits that there is no need to extend such controversy to this and a host of other federal statutes based merely on the presence of similar language. As one commentator has recognized,

> [g]iven the decisional morass that presently exists in the antitrust laws over the standing issue, reading

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6/ See, e.g., Note, Diluting Our Antitrust Laws: Federal Standing Analysis Under Section 4 of the Clayton Act, 4 U. Pitt. L. Rev. 241 (Fall 1984); Maurer, Blue Shield of Virginia v. McCready: The Limits of the Antitrust Injury Doctrine, 22 Am. Bus. L.J. 67 (1984); Susman, Standing in Private Antitrust Cases: Where Is The Supreme Court Going?, 52 Antitrust L.J. 465 (1983); Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809 (1977). A detailed summary of the divergence of opinion among the circuit courts as to the status of standing in antitrust cases is provided in Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486 (11th Cir. 1985).

> the antitrust standing doctrine into the [Bank Tying Act] would serve no salutary purpose. Indeed, this doctrine is antithetical to Congress' intent that Section 1972 is to have broad applicability to bank tying arrangements, since the general antitrust standing requirement restricts the scope of a defendant's liability and a plaintiff's right to recovery.

Naegele, The Anti-Tying Provision: Its Potential Is Still There, 100 Banking L.J. 138, 146 (1983) (footnote omitted).

II.

THE LOWER COURT'S DECISION CONFLICTS IN PRINCIPLE WITH RECENT DECISIONS OF THIS COURT.

In holding that the broad private right of action language contained in Section 1975 of the Bank Tying Act should not be interpreted as written, and that an additional and burdensome "direct injury" standing requirement should be implied, the lower court's

opinion conflicts in principle with at least two recent opinions of this Court. As the district court conceded, Petitioner has standing if "the broad language of the statute means precisely what it says." Pet. App. at E5. Petitioner submits that on at least two separate occasions within the past year, this Court has held that language of the type at issue in this case should be interpreted literally and has rejected as incorrect statutory interpretations that treat the actual statutory language as a mere secondary consideration.

In Board of Governors of the Federal Reserve System v. Dimension Financial Corp., ____ U.S. ____, 54 U.S.L.W. 4101 (U.S. Jan. 22, 1986) ("Dimension"), a case decided this term, this Court held that the definition of "bank" contained in the Bank Holding

Company Act -- the very statute to which the Bank Tying Act was added as an amendment in 1970 -- must be interpreted literally. Rejecting as non-authoritative a statement by one legislator inserted into the Congressional Record, this Court held that such a comment "cannot defeat the plain application of the words actually chosen by Congress to effectuate its will." Id. at 4104. As in this case, the Court in Dimension was faced with an interpretation of statutory language which was not based on its "plain language" but was instead purportedly justified by the lower court's interpretation of the "plain purpose" of the legislation. In rejecting this "plain purpose" argument, the Court reasoned as follows:

> The "plain purpose" of legislation, however, is determined in the first instance with reference to

> the plain language of the statute itself. Richards v. United States, 369 U.S. 1, 9 (1962). Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. . . . Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Id. at 4105. The Fifth Circuit's decision in this case proceeded not from an analysis of the language actually employed by Congress but from what it erroneously characterized as the "purpose and effect" of the statute at issue. Pet. App. at A5. This method of analysis is precisely the type condemned and discredited by this Court in Dimension with respect to the identical statute involved in this case.

Also conflicting with the Fifth Circuit's analysis in this case is this Court's recent decision involving the private right of action under RICO. Sedima, S.P.R.L. v. IMREX Co., Inc., ____ U.S. ____, 53 U.S.L.W. 5034 (U.S. July 1, 1985) (hereinafter "Sedima"). The private right of action provided in Section 1964(c) of RICO was enacted less than three months prior to, and contains language strikingly similar to that employed in, Section 1975 of the Bank Tying Act.[7/] Like the Bank Tying Act,

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[7/] The private right of action in RICO provides as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (1982).

the private right of action afforded by RICO was intended by Congress as "an aggressive initiative to supplement old remedies." Id. at 5039. The construction placed upon this analogous and contemporaneous provision is thus particularly important and relevant to the issue before this Court.

In Sedima, this Court was confronted, as in this case, with a defendant's attempt to defeat on narrow technical grounds a plaintiff's claim brought under a statute which provided that "any person injured in his business or property" may bring suit. Specifically, the defendant in Sedima argued that for a RICO plaintiff to have standing, the alleged injury must (1) arise out of acts that have been the subject of a criminal conviction, and (2) be of a certain type (a "racketeering type injury"). As in this case, the defen-

dant in Sedima argued that the private right of action had been modeled on Section 4 of the Clayton Act and reasoned that standing should therefore be limited in a similar fashion. Id. at 5035. However, this Court rejected the defendant's first request that a criminal conviction requirement be imposed noting that "[t]he language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction. The word 'conviction' does not appear in any relevant portion of the statute." Id. at 5036. The Court also noted that "[p]rivate attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps," id. at 5038, and adopted a liberal construction of this provision because a contrary rule "would severely handicap potential plaintiffs." Id.

The Court also rejected on statutory grounds the defendant's additional claim that a "racketeering injury" requirement could and should be read into the plain language of the statute.

> A reading of the statute belies any such requirement. Section 1964(c) authorizes a private suit by "[a]ny person injured in his business or property by reason of a violation of § 1962." Section 1962 in turn makes it unlawful for "any person" -- not just mobsters -- to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. §§ 1962(a)-(c). If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.

Id. As with the statutory provision at issue in Sedima, the anti-tying provisions of the Bank Tying Act were not added to the Sherman Act, but were instead placed in a separate statute. Id. at 5039. This is an important indication that Congress did not intend the complex and confusing body of antitrust precedent to confound potential plaintiffs. Id. Rejecting in strong terms the position that a competitive injury of some type must be demonstrated by a RICO plaintiff, this Court in Sedima stated that " . . . Congress 'nowhere suggested that actual anti-competitive effect is required for suits under the statute.' . . . The language it chose, allowing recovery to '[a]ny person injured in his business or property,' § 1964(c) . . ., applied to this situation, suggests that the statute is not

so limited." Id. at 5039 n.15 (citations omitted, emphasis in original).

Just as this Court held in Sedima that the language in Section 1964(c) of RICO was clear and did not permit the courts to engraft artificial standing and injury requirements,[8/] the virtually identical language adopted contemporaneously by Congress in the Bank Tying Act should and must be similarly and

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[8/] Further illustrating the importance of the question at issue in this case and the lower courts' need for guidance on such issue, the Eighth Circuit has recently taken the position that an indirectly injured plaintiff under RICO has standing under the virtually identical language of Section 1964(c), see Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc., 772 F.2d 467, 472-73 (8th Cir. 1985), cert. denied, ____ U.S. ____, 54 U.S.L.W. 3628 (U.S. Mar. 25, 1986), while the Seventh Circuit has held, even after this Court's decision in Sedima, that such a plaintiff does not have standing, see Carter v. Berger, 777 F.2d 1173, 1175 (7th Cir. 1985).

consistently construed. In fact, even a more compelling case can be made for a literal interpretation of the Bank Tying Act since this Court conceded that the private right of action under RICO was "evolving into something quite different from the original conception of its enactors," id. at 5039, whereas, as discussed below, a broad interpretation of the Bank Tying Act is consistent with and furthers congressional intent as to that statute. Both the spirit and holding of this Court's opinion in Sedima compel a construction of Section 1975 of the Bank Tying Act which is as broad as its statutory language.

III.

THE LOWER COURT'S DECISION FRUSTRATES IMPORTANT CONGRESSIONAL POLICY OBJECTIVES.

The Fifth Circuit's indiscriminate transfer to the Bank Tying Act of the

standing requirements that have been implied into Section 4 of the Clayton Act is inconsistent with the legislative history of the Bank Tying Act and overlooks the characteristics that distinguish the Bank Tying Act violation committed by the Banks in this case from the violations of the antitrust laws as to which the standing requirements were developed. If Congress had intended that judicial interpretations of the antitrust laws be incorporated en masse into the Bank Tying Act, then there would have been no need for the presumably redundant anti-tying provisions of the Bank Tying Act. To the contrary, because of the widespread evils caused by tying arrangements, Congress clearly intended to go beyond existing antitrust doctrines and limitations in enacting the private right of action contained in

the Bank Tying Act. It would eviscerate this remedial statute to adopt a restrictive interpretation of standing that left the entity that dealt most directly with the Banks (and thus presumably the least likely to possess adequate resources) as the only party able to bring what is likely to be expensive litigation against financial institutions with vastly superior resources. As one commentator recently noted in rejecting the application to the Bank Tying Act of the restrictions applied to Section 4 of the Clayton Act,

> [t]his type of judicial gloss on section 1975's standing requirement runs counter to congressional intent. Congress intended to encourage private plaintiffs to sue for section 1972 violations. The provision was intended to supplement existing remedies for anticompetitive tying arrangements. The legislative history does not mention any standing requirements other than those expressly stated in

> the statute. Nor does the legislative history indicate that Congress intended courts to interpret section 1972 in the same way in which similarly worded statutes are interpreted. While Congress may have known of the judicial gloss placed on other provisions worded similarly to section 1975, it clearly intended to create a cause of action which was easier to bring than actions under the general antitrust laws and thus free of their restrictive interpretations.

Note, Section 1972: Augmenting the Available Remedies for Plaintiffs Injured by Anticompetitive Bank Conduct, 60 Notre Dame L. Rev. 716-17 (1985) (footnotes omitted).

When Congress enacted the Bank Tying Act, it was specifically aware of Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969), and other antitrust precedents involving credit tying arrangements. 116 Cong. Rec. 32,132 (1970) (remarks of Sen.

Bennett). However, Congress enacted the Bank Tying Act because it wished to go beyond restrictions imposed by existing antitrust precedent, see id. (remarks of Sen. Brooke). Congress believed that the anti-tying provisions of the Bank Tying Act were "designed to afford private litigants rights of action based on express or implied tying practices which heretofore involved little likelihood of redress." 116 Cong. Rec. 42,432 (1970) (Statement of Sen. Brooke). In addition, Congress intended "these private rights of action to be a valuable supplement to the enforcement efforts of the U.S. attorneys." 116 Cong. Rec. 31,823 (1970) (remarks of Sen. Sparkman). Contrary to the Fifth Circuit's assumption, the Bank Tying Act was not designed merely to apply the antitrust laws as they then

existed, with minor exceptions, to banks. Indeed, the legislative history confirms that Congress intended to eliminate tying regardless of whether such practices resulted in competitive injury--the sine qua non of an antitrust violation.

> [T]ying arrangements involving a bank are made unlawful by this section without any showing of specific adverse effects on competition or other restraints of trade and without any showing of some degree of bank dominance or control over the tying product or service. Moreover, as individual tying arrangements may involve only relatively small amounts, the prohibitions of this section are applicable regardless of the amount of commerce involved.

Sen. Rep. No. 1084, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 5519, 5558 (Supplementary Views of Sen. Brooke).

The importance that Congress plainly attached to the private right of action under the Bank Tying Act is

emphasized by its clearly expressed intent to provide a weapon against abusive financial practices that did not exist in the plaintiffs' antitrust arsenal at the time of enactment. This legislative intent is manifestly inconsistent with the imposition of narrow and technical restrictions upon the private right of action contained in the Bank Tying Act. The standing restrictions implied into the statute by the lower court would have the effect of codifying what Congress thought it was rejecting and rendering ineffectual the "valuable supplement" that Congress sought to provide.

IV.

THE LOWER COURT'S DECISION FAILS TO TAKE INTO ACCOUNT IMPORTANT EXCEPTIONS TO THE "DIRECT INJURY" REQUIREMENT RECOGNIZED BY THIS COURT.

Even if it is assumed, arguendo, that the standing doctrines applicable

to antitrust cases are applicable to the Bank Tying Act, the lower court incorrectly applied such doctrines to the facts of this case. Even in antitrust cases, the requirement that a plaintiff demonstrate a "direct" injury is not absolute. In Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) (hereinafter "Hanover Shoe"), this Court rejected a defendant's attempt to assert a "passing-on" defense in an antitrust action. In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (hereinafter "Illinois Brick"), this Court extended this same analysis to plaintiffs by barring antitrust actions by indirect purchasers against alleged price-fixers. However, in fashioning these rules, the Court was careful to emphasize "that there might be situations -- for instance, when an

overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged -- where the considerations requiring that the passing-on defense not be permitted in this case would not be present." Hanover Shoe, 392 U.S. at 494. Thus, in the years since Hanover Shoe and Illinois Brick, the lower courts and commentators have repeatedly observed that situations involving the "functional equivalent" of a cost-plus contract fall within a classic exception to the "direct injury" requirement created by this Court. See, e.g., In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1163-65 (5th Cir. 1979), cert denied 449 U.S. 905 (1980); Note, Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages, 55 Tex. L. Rev. 1445, 1454-57 (1978).

Petitioner submits that to the extent that antitrust standing analysis is applicable to the instant case, the exceptions recognized by this Court to the prohibition of suits by indirectly injured persons are also applicable. This Court found in Illinois Brick that a "cost-plus" contract represented an exception to the rule against suits by indirect purchasers in the antitrust context because the presence of such a contract meant that the effect of the violation in question (i.e., price fixing) was passed on to more remote parties in a fashion where "[u]ncertainties of proof are thus avoided." In re Beef Industry Antitrust Litigation, 600 F.2d at 1163. The violations alleged in this case consist of abusive credit practices rather than price fixing. Because the Banks knew at the time they

committed such practices that Lexco was insolvent, that Lexco was drilling the Tuscaloosa Wells, and that Lexco had conveyed interests in the wells to other entities such as Petitioner, the effect of such unlawful credit practices was automatically and mechanically transferred to the Tiger Trust and other co-owners of working interests in the wells because Louisiana law authorized suppliers of materials and services to Lexco to file mechanic's and materialmen's liens against not only Lexco's interest in the Tuscaloosa Wells but also against the interests of the other owners. See Pet. App. at A7. To the extent such liens are ultimately paid out of the proceeds of production attributable to the Tiger Trust's interest, such injury is both easily ascertainable and distinct from the injury suffered by

Lexco. The Tiger Trust's injury is clearly not subject to the complicated issues surrounding proof of an indirect market injury which caused this Court to limit such suits in the antitrust context. Accordingly, because an exception to the "direct injury" antitrust standing requirement is applicable, the lower court erred in not permitting Petitioner's action to proceed.

CONCLUSION

For the reasons set forth above, Petitioner submits that a writ of certiorari should issue and be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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